



STATE OF NEW JERSEY
Board of Public Utilities
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June 17, 2002

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
455 12th Street, SW Portals II Building
Washington, DC 20544

Re: CS Docket No. 02-52

In the Matter of the Inquiry Concerning High Speed Access to the Internet
Over Cable and Other Facilities

Internet Over Cable Declaratory Ruling

Appropriate Regulatory Treatment for Broadband Access to the Internet
Over Cable Facilities

Dear Ms. Dortch:

The New Jersey Board of Public Utilities (“the Board” or “NJBPU”), hereby files answers to the selected questions posed in the Federal Communications Commission’s (FCC) Notice of Proposed Rulemaking (NPRM) which addressed the consequences of the classification of cable modem service as an “Information Service”, as defined in section 3(20) of the Communications Act of 1934 as amended, 47 U.S.C. §153 (20).

The Commission has requested comments on several specific areas of concern to the Board which we address as follows:

- Should the FCC interpret its assertion of jurisdiction under the Communications Act to preclude state and local authorities from regulating cable modem service and facilities in particular ways?

The State of New Jersey’s 1972 Cable Television Act, N.J.S.A. 48:5A-1 et seq.(the Act) mandates the Board’s Office of Cable Television to provide safe, adequate, and proper service to

subscribers. N.J.S.A. 48:5A-2. The statutory mandate of the FCC is to “encourage the ubiquitous availability of broadband to all Americans,” a goal which is also shared by the NJBPU, in addition to the other mutual goal of consumer protection.

The New Jersey Act, defines a “cable communications system” or “cable communications service” as any communications service other than cable television reception service delivered through the facilities of a CATV system and for which charges in addition to or other than those made for cable television reception service are made or proposed to be made.” N.J.S.A. 48:5A-3.

Based on the above, it is apparent that the New Jersey Legislature envisioned that cable television operators would be providing services other than traditional cable television service and that the Legislature intended that the Board have wide powers over cable television operators. N.J.S.A. 48:5A-9.

In light of the broad authority provided to the NJBPU by the state Legislature for the regulation of both cable television and telecommunications service and the expansive definition of cable television service in N.J.S.A. 48:5A-3(j), the NJBPU believes that it is reasonable to conclude that our Legislature intended the Board to have authority to address issues of services other than cable television reception service provided by cable operators.

- Should the FCC use its authority to preempt specific state law or local regulations?

Cable modem service is available to approximately 56% of New Jersey households. The service is also nationally available to 8 million consumers. The cable modem subscriber, at least in our state, will go to the cable television regulator to resolve any issue with the cable modem with a firm belief that the franchising authority must act on their behalf.

The ability to measure fault management, track outages and resolve subscriber issues became evident in New Jersey in January 2002 when Comcast’s ISP Excite @ Home filed for bankruptcy causing the cable operator to establish itself as a self-provider of all functions on its Internet backbone facility. Over a six-day period, the Board’s Staff received over 2,200 complaint calls related to the failures of the network conversion. The Board’s staff asserted ancillary jurisdiction since cable modem charges appear on a cable subscribers bill much like the Board staff intervenes on a network programming outage allowing daily rebates for any outage over six hours. Comcast, it should be noted, willingly worked with Board staff to resolve any complaints and associated issues such as bill credits. This demonstrates that state law and regulation promulgated pursuant thereto can best address service quality issues.

- How does the FCC classification of cable modem service as an interstate information service impact rights-of-way and franchising issues?

New Jersey is a home rule state. The franchising process is bifurcated in that the municipalities manage their respective rights-of-way. The rights-of-way issues have both legal and policy implications. In New Jersey, legislation caps municipalities to 2% of the basic tier revenue for use of the municipal streets. In practice, some operators pay franchise fees on both the basic and cable programming tiers. Municipalities can petition the Board for a higher fee, but must demonstrate how the additional fees will be used to support cable-related activities. We believe that the term “cable communications services” in our State Act allows for discussion between the parties.

There have been voluntary agreements between operators and municipalities where the rights-of-way are used for telephony. The Board believes the issue of rights-of-way is better left to the franchising authorities as governed by state law rather than a one size fits all national standard. In New Jersey, there have also been some instances where the renewal process is delayed due to conflicts regarding this issue. However, these disputes often are settled during the franchise renewal process without recourse to litigation.

- Does the provision of additional services over the upgraded cable facilities impose additional burdens on the public rights-of-way such that the existing franchise process is inadequate?

The rights-of-way may be burdened in some instances if retrofitting the network highway causes substantial construction activity. The determination must be dealt with on a case-by-case basis. If there is a broad determination by the FCC that additional uses generally would create additional burdens, then the municipalities would be on firmer ground in negotiations but would also bear the fair burden of proof. Without any federal determination, the municipalities should have the ability to increase the performance bonds as well as the ability to petition our Commissioners or an Administrative Law Judge for a higher franchise fee than is standard under our state law.

- Do state statutes and constitutional provisions authorizing local franchising in terms of utility services generally or cable and telecommunication networks and services specifically, authorize localities to franchise providers of information services under the existing law? Is there any basis for treating facilities based providers of information services differently based on the facilities used?

The Board notes that in New Jersey there is only one traditional telephone company providing competitive video services over the existing network. That provider, WVT, formerly Warwick Valley Telephone, has elected to be franchised as a traditional cable television system for the provision of video programming rather than an alternative Open Video System. The Board further notes that in so much as WVT has elected to be treated as a traditional cable company, and file for approval of a cable franchise for the provision of its video service, the regulatory treatment between WVT and the incumbent cable company is identical. Had RCN fulfilled its plan to serve any of the 83 municipalities the FCC certified them to serve in New Jersey as an OVS provider, the Board would have had substantial empirical data on which to recommend treatment of the competing technology.

- Does Title VI provide an independent basis of authority for assessing fees on cable modem service? With respect to franchise fees previously paid pursuant to Section 622 of the Federal Cable Act on cable modem services, is it appropriate for the FCC to exercise its jurisdiction to resolve the issue or is it better left to the courts?

New Jersey's state cable television assessment is based on gross revenues from all recurring charges for basic service. If obligations are left to the state, then it follows that the state assessment can fund investigations on behalf of the public. The NJBPU believes that the matter of past compensation to the municipalities from franchise fees collected from cable modem usage is best left to the state courts.

- Should the authority conferred on franchising authorities by 632(a) of the Communications Act to establish and enforce customer service requirements apply to cable modem service provided by a cable operator?

The Board's intervention enabled customers to get the information they needed to solve the Excite @ Home conversion process by acting as an intermediary.

The NJBPU does not see any disagreement from the FCC in relation to this jurisdiction being placed within the state as long as enabling broadband technologies to flourish.

Experience has demonstrated that there must be some fair balance of state and federal jurisdiction which does not hamper deployment but assures quality of service provisions. While it is still unclear what the FCC will do on the issue of parity, the NJBPU believes the FCC should consider adopting similar regulatory footing for DSL as it does for cable modem service. DSL is growing as a residential competitor but until such time as vigorous competition exists among similarly priced and similarly functional services to whom does the consumer go with a complaint. If not us, who?

With respect to this issue, in answer to the FCC's desire to remove regulatory uncertainty that could thwart innovation in broadband services so as to limit the timely advancement of such services, submits the following observations.

In New Jersey, each provider either has or is in the process of providing advanced services through upgraded networks. We believe our state policies have played an important role in the readiness and timely entrance by cable operators into the broadband market by advocating state of the art networks. The FCC has given cable operators incentive to rebuild facilities with additional rate recovery from subscribers permitted for construction of the broadband networks.

Finally, with respect to the Commission's inquiry regarding Open Access, the NJBPU believes the issue is best left to the FCC to establish clear goals and direction to resolve the issue on a national level. It is encouraging to observe that voluntarily some operators are opening up their platforms or promising to do so. However, if one takes the promise to the next generation,

there is a troublesome potential if programming does migrate from the television to the computer as some cable operators themselves prognosticate. The dispute in the metropolitan area over the non-carriage of the YES network leaves us with a concern that someday programming could be unavailable or unregulated or a combination of the two if the technology evolves and the FCC decides on forbearance.

With respect to the cost of cable modems, the NJBPU believes ideally the issue of leasing or purchasing cable modems should be a consumer selection accomplished in a uniform market. At the very least, this should be a determination left to the states.

As one of only a handful of states which regulate cable television operators under a utilities commission, the NJBPU believes it can, as it have for decades, apply even-handed policies in the public interest, including any and all regulations proposed for two of the most important sources of information: cable television and the computer.

We urge the FCC to be responsive to these requests and appreciate the opportunity to make our views known.

DATED: June 17, 2002

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